COMMITTEE REPORT:
ELDER CARE

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Benefits of Designating a Trusted Contact Person

It may help to curtail elder financial abuse

"Once plague had shut the gates of the town, they had settled down to a life of separation."[1]

When plague attacks and quarantine is imposed, it causes a sense of imprisonment that includes feelings of overwhelming stress, fear and anxiety. This phenomenon, so aptly described in Albert Camus' *The Plague,*[2] also epitomizes today's reality. Prior to the COVID-19[3] pandemic, financial exploitation of the elderly was of significant concern, but social isolation, quarantine and fear of infection heighten the risk of abuse to seniors and members of other vulnerable groups. Now, more than ever, it's important for individuals, especially those most vulnerable to financial abuse, to take steps to protect themselves. This may include designating a trusted contact person (TCP) for securities accounts.

Through this designation, a financial advisor is provided with someone to contact if he suspects financial abuse or that the account holder is suffering a mental decline. The Financial Industry Regulatory Authority (FINRA) initiated the TCP system as a means of curtailing elder financial abuse. FINRA Rule 4512 (Rule 4512) requires that financial advisors make reasonable efforts to obtain from the account holder the name and contact information of a TCP whenever a non-institutional account is opened or updated. Although financial advisors must make reasonable efforts, the account holder isn't required to designate a TCP. However, if the account holder designates a TCP, that designee can serve as a resource for the FINRA member institution (financial institution) in protecting the individual's account and quickly responding to suspected financial exploitation.[4] In conjunction with Rule 4512, FINRA Rule 2165 (Rule 2165) permits a temporary hold to be placed on the disbursement of funds or securities under certain circumstances.

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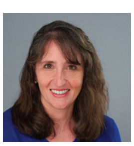
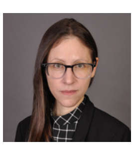


Elder Financial Abuse

While COVID-19 affects every generation, self-isolation disproportionately affects elderly individuals. Those who don't have close family or friends, and rely on the support of community centers, social services and religious organizations whose programs may be limited or unavailable during the pandemic, may experience increased feelings of loneliness, isolation and seclusion. Even those who have close family or friends may now be isolated from those individuals due to social distancing restrictions and fear of disease transmission.

Social isolation is one of the greatest risk factors for elder financial exploitation. According to the American Bar Association Commission on Law and Aging, COVID-19 isolation may heighten the risk for elder abuse in a number of ways: (1) adults who are vulnerable to maltreatment may be isolated with their abusers; (2) financial pressures may result in an increase in financial exploitation; (3) caregivers may neglect their duties out of fear or inability to provide care; (4) increased self-neglect may result from isolation and curtailment of local services; and (5) scams related to COVID-19 will inevitably target seniors.[5]

In recent years, efforts to identify emerging trends

in financial crime have significantly increased in an effort to protect vulnerable individuals. For example, in February 2019, the Consumer Financial Protection Bureau (CFPB) released a study on elder financial abuse entitled "Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends."[6] Using information from Suspicious Activity Reports (SARs) to identify emerging trends in financial crime, this study called on financial institutions proactively to monitor and report suspicious activity to law enforcement and adult protective services.

The CFPB analyzed 180,000 elder financial exploitation SARs filed with the Financial Crimes Enforcement Network from 2013 to 2017, involving more than $6 billion. This first-ever public analysis provided a chance to better understand elder fraud and to find ways to improve prevention and response. Important findings from the study included: (1) SAR filings on elder financial exploitation quadrupled from 2013 to 2017; (2) older adults ages 70 to 79 lost on average $45,300; and (3) when the older adult knew the suspect, the average loss was even larger—about $50,000.[7]

New FINRA Rules

In an effort to curb rampant financial abuse of the elderly and other vulnerable groups, FINRA and the U.S. Securities and Exchange Commission's Office of Investor Education and Advocacy began urging individuals to add a TCP to securities accounts.

On Feb. 5, 2018, amendments to Rule 4512 and Rule 2165 became effective. These two rules address concerns raised by FINRA over several years that financial institutions weren't doing enough to prevent financial exploitation of vulnerable account holders.

The amendments to Rule 4512 require that financial institutions make reasonable efforts to obtain a TCP for each applicable account; however, they don't prohibit financial institutions from opening and maintaining an account if an account holder fails to identify a TCP. Reasonable efforts may be satisfied simply by a financial advisor asking the account holder if he wishes to identify a TCP. In this sense, arguably the amendments don't go far enough.

If a financial institution "reasonably believes that financial exploitation has occurred, is occurring, has been attempted or will be attempted," Rule 2165 permits a temporary hold to be placed on the disbursement of funds or securities from the account of a "specified adult" customer. Specified adults include: (1) individuals age 65 or older, and (2) individuals age 18 or older who are reasonably believed to have a mental or physical impairment rendering them unable to protect their own interests. The financial institution's decision that an account holder is unable to protect his own interests may be based on the facts and circumstances observed in a financial advisor's business relationship with the account holder.

If a financial institution places a temporary hold on an account, Rule 2165 requires that an internal review of the facts and circumstances be immediately initiated. The temporary hold expires no later than 15 business days after the date on which the hold was placed, unless otherwise terminated or extended. Rule 2165 permits an extension of up to 10 business days.

> It's important to note that the rule permits a temporary hold to be placed on a particular suspicious disbursement, but not on other, non-suspicious disbursements.

A financial institution isn't required to withhold a disbursement of funds or securities under Rule 2165. Instead, the rule creates a safe harbor from activities that would otherwise be violations when withholding, even temporarily, a requested disbursement from an individual's account.

It's important to note that the rule permits a

temporary hold to be placed on a particular suspicious disbursement, but not on other, non-suspicious disbursements. Also, Rule 2165 doesn't apply to transactions in securities. For example, Rule 2165 wouldn't apply to an account holder's order to sell shares of stock. However, if an account holder requested that the proceeds of the sale be disbursed out of his account, then the rule applies. Also, the financial institution is required to notify all parties authorized to transact business on the account and the TCP of the temporary hold.

While anyone over the age of 18 can be named as the TCP, there are obviously a number of important factors that should be considered in selecting an appropriate individual to serve in this capacity.

Estate Planner's Role

In light of Rule 4512's requirement that financial institutions make reasonable efforts to have a TCP selected for securities accounts, it's important for estate planners to add the selection of a TCP to the list of items they discuss with clients. Selection of a TCP is an important decision and one that needs to be carefully coordinated with a client's overall estate plan.

If a financial advisor notices suspicious activity or other red flags indicating suspected financial exploitation or fraud in connection with an individual's account or if the financial advisor suspects that the account holder is in mental decline, the designation of a TCP gives the financial advisor someone to contact to raise these concerns. In that sense, the TCP is the first line of defense, and it's important to take care in selecting the right person for this important role.

The TCP is also the individual the financial advisor will turn to in the event that he can't reach the account holder or if he needs to verify information, such as the account holder's address or phone number, the identity of an agent under a power of attorney (POA) or to find out if such information has changed.

While the TCP has no authority to act on the account, sensitive account information may be released to the TCP for him to fulfill his role as liaison between the financial institution and the account holder. This may include disclosing information to the TCP about the account for the purpose of addressing suspected financial exploitation, confirming the account holder's current contact information, health status or the identity of any legal guardian, executor, trustee or holder of a POA. Releasing this personal information into the wrong hands can be detrimental to the account holder.

Unfortunately, financial exploitation of seniors is most often perpetrated by someone the individual knows and trusts. According to one study, family members were the most common offenders, followed by friends and neighbors and then home care aides.[8] If a potential wrongdoer is named as the TCP, gaining information about the account holder's finances may encourage him to prey on the account holder.

Selecting a TCP

While anyone over the age of 18 can be named as the TCP, there are obviously a number of important factors that should be considered in selecting an appropriate individual to serve in this capacity. Often, the TCP will be a family member, such as a spouse or a child, with whom the client has a close relationship and who'll be aware of changes in the client's life. However, in selecting a suitable TCP, it's important to be mindful of family dynamics and to be sensitive to other factors that may influence an individual's suitability. A professional advisor can be instrumental in helping to guide the client in the selection of the most appropriate TCP.

The TCP may find himself in a situation in which he'll need to manage conflicts arising among other family members. Can the potential nominee handle this responsibility? In the case of a second (or third) marriage, should the spouse be the TCP? Will this cause conflict with the children of a prior marriage? Likewise, would naming one of the children as the TCP cause conflict with the current spouse?

What if an individual has named his spouse as the TCP, but is now embroiled in a divorce? As with other

estate-planning documents, such as a health care directive and POAs, it's important to remember to update the designation of a TCP in the event of the commencement of a divorce if a spouse was named.

While the TCP can be a family member, it doesn't need to be. In the case of a complex family situation or when there's a clear threat of financial elder abuse, the prudent course may instead be to name a professional advisor, such as an attorney or accountant, as the TCP.

It's also important to designate a TCP *before* mental decline occurs and for advisors to be involved in the selection so that the account holder doesn't inadvertently name someone as a TCP who could be the abuser, thereby defeating the purpose of naming a TCP. Above all else, the TCP should be someone who won't take advantage of the role.

Rule 4512 doesn't prohibit joint account holders, trustees, agents under POAs and other authorized parties on an account from being designated as the TCP. With that being said, Rule 4512 arguably doesn't provide adequate protections against misdeeds committed by someone acting in one of those capacities. To whom could a financial advisor turn, for instance, if a joint account holder is named as the TCP and is the one suspected of taking financial advantage of the other account holder?

For this reason, perhaps advisors should recommend that the TCP be someone different from the individual currently acting as agent under a POA. Would this provide some level of protection against an individual abusing his fiduciary role? How does the client decide who should be the TCP and who should be the agent under the POA? If each role is filled by a different individual, what should be done if there's a conflict?

Similarly, would having another individual acting as agent under a POA with respect to the account provide a check and balance against misdeeds by the TCP if he's the one poised to take financial advantage of the account holder?

Although the TCP rules were initially contemplated for accounts in the name of a natural person, the rules are also useful for other accounts. For example, if an individual is serving as the sole trustee of a revocable trust created by him during his lifetime, designating the successor trustee under the trust instrument as the TCP would be prudent.

Finally, insofar as the rule requires the financial institution to provide notification of the hold and the reason for the hold to the TCP *and* all parties authorized to transact business on the account, Rule 4512 arguably could lead to disharmony in the event the TCP is being named specifically to provide a check and balance against the authorized party.

Designation Process

The process for designating a TCP may vary from institution to institution. Some institutions may permit this to be done online when the account holder logs on to his account. While this may provide convenience, it also opens the door for abuse if there isn't a means to verify that the account holder is the one making the designation, such as two-way video or telephone confirmation. It also doesn't facilitate a dialogue between the account holder and the financial advisor as to who's being selected as the TCP and the appropriateness of the selection.

Now, more than ever, it's important for estate planners to add the selection of a TCP to the list of items they discuss with clients.

An Important Discussion

In light of the unprecedented social isolation of already vulnerable individuals stemming from the COVID-19 pandemic, it's increasingly important to use mechanisms designed to allow financial institutions proactively to monitor suspicious activity. Now, more than ever, it's important for estate planners to add the selection of a TCP to the list of items they discuss with clients. Failure to carefully coordinate this decision with a client's overall estate plan could undermine the system's effectiveness—or worse.

At the end of *The Plague,* "we learn in time of pestilence: that there are more things to admire in men than to despise."[9] Zealous advocacy by members of the estate-planning community during the current pandemic has resulted in sweeping legislation and

executive orders including those authorizing remote notarization and remote witnessing of documents. This has ensured that clients have been able to work with their estate planners to implement their lifetime and testamentary planning objectives without jeopardizing their health and safety. Because part of this process requires an open and honest discussion as to whom should be selected to fill a number of fiduciary roles, the estate planner is well positioned to discuss the selection of a TCP in this context.

SPOT LIGHT

Silhouette

Portrait by Nathan Oliveira sold for $8,200 at Bonhams Made in California Contemporary Art auction on May 29 - June 11, 2020 in Los Angeles (online). Oliveira was known for exploring human isolation and alienation in his works. Though his popularity peaked in 1959, he was soon faced with stiff competition from the emerging Pop Art movement.

Endnotes

1. Albert Camus, *The Plague* (1948) at p. 308.
2. *Ibid.*
3. On Feb. 11, 2020, the World Health Organization announced an official name for the disease that's causing the 2019 novel coronavirus outbreak, first identified in Wuhan, China. The new name of this disease is coronavirus disease 2019, abbreviated as COVID-19. In COVID-19, "CO" stands for "corona," "VI" for "virus" and "D" for "disease." Formerly, this disease was referred to as "2019 novel coronavirus" or "2019-nCoV." There are many types of human coronaviruses. COVID-19 is a new disease, caused by a novel (or new) coronavirus that hasn't previously been seen in humans. *See* Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), Frequently Asked Questions, *www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics.*
4. Financial Industry Regulatory Authority (FINRA) Rule 4512 defines "financial exploitation" as:

   (A) The wrongful or unauthorized taking, withholding, appropriation, or use of a specified adult's funds or securities; or (B) any act or omission taken by a person, including through the use of a power of attorney, guardianship, or any other authority, regarding a specified adult, to: (i) obtain control, through deception, intimidation or undue influence, over the specified adult's money, assets or property; or (ii) convert the specified adult's money, assets or property.

   See FINRA Rule 4512, Customer Account Information, *www.finra.org/rules-guidance/rulebooks/finra-rules/4512.*
5. David Godfrey, "Coronavirus Isolation May Heighten Risk for Elder Abuse," American Bar Association, *www.americanbar.org/groups/law_aging/resources/coronavirus-update-and-the-elder-law-community/coronavirus-and-elder-abuse/.*
6. "Consumer Financial Protection Bureau, Suspicious Activity Reports On Elder Financial Exploitation: Issues And Trends" (2019), *www.consumerfinance.gov/data-research/research-reports/suspicious-activity-reports-elder-financial-exploitation-issues-and-trends/.*
7. *Ibid.*
8. Janey C. Peterson, et al., "Financial Exploitation of Older Adults: A Population-Based Prevalence Study," *J. Gen. Internal Med.* 29, 1615-1623 (2014).
9. *Supra* note 1.